

(c) *Annuities, custodial accounts, etc.* See section 401 (f) for rules relating to the treatment of certain annuities, custodial accounts or other contracts, as trusts for purposes of section 401(a).

(d) *Source of plan distributions to participants and beneficiaries residing outside the United States.* Except as provided under section 871(f) (relating to amounts received as an annuity by nonresident aliens), the amount of a distribution from an electing plan that is to be treated as income from sources within the United States is determined as described below. The portion of the distribution considered to be a return of employer contributions is to be treated as income from sources within the United States in an amount equal to the portion of the distribution considered to be a return of employer contributions multiplied by the following fraction:

Days of performance of labor or services within the United States for the employer.

Total days of performance of labor or services for the employer.

The days of performance of labor or services within the United States shall not include the time period for which the employee's compensation is deemed not to be income from sources within the United States under subtitle A of the Code. Thus, for example, if an employee's compensation was not deemed to be income from sources within the United States under section 861(a)(3), then the time the employee was present in the United States while such compensation was earned would not be included in determining the days of performance of labor or services within the United States in the numerator of the above fraction. In addition, days of performance of labor or services for the employer in both the numerator and denominator of the above fraction are limited to days of plan participation by the employee and any service used for determining an employee's accrued benefit under the plan. The remaining portion of the distribution, that is, any amount other than the portion of the distribution considered to be a return of employer contributions, is not to be treated as income from sources within the United States. For example, if a distribution

consists of amounts representing employer contributions, employee contributions, and earnings on employer and employee contributions, no part of the portion of the distribution attributable to employee contributions, or earnings on employer and employee contributions, will be treated as income from sources within the United States.

[T.D. 7859, 47 FR 54297, Dec. 2, 1982]

**§ 1.401(a)(2)-1 Refund of mistaken employer contributions and withdrawal liability payments to multi-employer plans.**

(a) *Introduction*—(1) *In general.* Section 401(a)(2) provides that a contribution or payment of withdrawal liability made to a multiemployer plan due to a mistake of fact or mistake of law can be returned to the employer under certain conditions. This section specifies the conditions under which an employer's contribution or payment may be returned.

(2) *Effective dates.* This section applies to refunds made after July 22, 2002.

(b) *Conditions for return of contribution*—(1) *In general.* In the case of a contribution or a withdrawal liability payment to a multiemployer plan which was made because of a mistake of fact or a mistake of law, the plan will not violate section 401(a)(2) merely because the contribution or payment is returned within six months after the date on which the plan administrator determines that the contribution or payment was the result of a mistake of fact or law. The contribution or payment is considered as returned within the required period if the employer establishes a right to a refund of the amount mistakenly contributed or paid by filing a claim with the plan administrator within six months after the date on which the plan administrator determines that a mistake did occur. For purposes of this section, plan administrator is defined in section 414(g) and the regulations thereunder.

(2) *Applicable conditions*—(i) *In general.* The employer making the contribution or withdrawal liability payment to a multiemployer plan must

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demonstrate that an excessive contribution or overpayment has been made due to a mistake of fact or law. A mistake of fact or law relating to plan qualification under section 401 or to trust exemption under section 501 is not considered to be a mistake of fact or law which entitles an employer to a refund under this section. For purposes of this section, a multiemployer plan is defined in section 414(f) and the regulations thereunder.

(ii) *Amount to be returned*—(A) *General rule.* The amount to be returned to the employer is the excess of the amount contributed or paid over the amount that would have been contributed or paid had no mistake been made. This amount is the excess contribution or overpayment. Except as provided in paragraph (b)(2)(ii)(B) of this section, interest or earnings attributable to an excess contribution shall not be returned to the employer, and any losses attributable to an excess contribution must reduce the amount returned to the employer. For purposes of the previous sentence, the application of plan-wide investment experience to the excess contribution would be an acceptable method of calculating losses. A refund of a mistaken contribution must in no event reduce a participant's account balance in a defined contribution plan to an amount less than that amount which would properly have been in that participant's account had no mistake occurred. Thus, to the extent that the refund of an excess contribution would reduce a participant's account balance in a defined contribution plan to an amount less than the amount which would properly be in the participant's account had no mistake occurred, the return of the excess contribution would be prohibited by this section.

(B) *Overpayment of withdrawal liability.* In the case of an overpayment of withdrawal liability established by the plan sponsor under section 4219(c)(2) of ERISA, the plan will not fail to satisfy section 401(a)(2) if, in accordance with Pension Benefit Guaranty Corporation regulations regarding the overpayments of withdrawal liability (29 CFR 4219.31(d)), the overpayment, with interest, is returned to the employer.

(c) *Amount refunded includible in employer's income.* In general, the amount of the excess contribution or overpayment must be included in gross income by the employer if the excess contribution or overpayment resulted in a tax benefit in a prior year. Any interest credited or paid on the refund of mistaken withdrawal liability payments must also be included in gross income by the employer.

(d) *Application of section 412.* An amount returned under paragraph (b)(2)(ii) of this section is charged to the funding standard account under section 412 in the year in which the amount is returned.

[T.D. 9005, 67 FR 47693, July 22, 2002]

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